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Supreme Court of the United States

October Term, 1976
No. 76-1517

RICHARD E. JACOBS, *et al.*,
Petitioners,
vs.
LEONARD W. SAPP, RALPH HURWITZ,
and CHARLES ROBBINS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit

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No. _____

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LEONARD W. SAPP, RALPH HURWITZ,
and CHARLES ROBBINS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit

Pursuant to Rule 19 of the Rules of this Court petitioners[1] pray for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit reversing a decision of the United States District Court for the Southern District of Illinois dismissing this action for lack of subject matter jurisdiction.

---

[1] Petitioners are the defendants in this action, Richard E. Jacobs, David H. Jacobs, Dominic Visconsi, R. F. Coffin, and Edward H. Crane, d/b/a Springfield Joint Venture, May Department Stores Company, Sears, Roebuck and Company, and Paul Barker.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals, unreported as per the instructions of that court, and the Order of the Seventh Circuit Court of Appeals denying petitioners' Petition for Rehearing En Banc are set forth in Appendix A hereto. The opinion of the United States District Court for the Southern District of Illinois, which is officially reported at 408 F. Supp. 119, is set forth in Appendix B hereto.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1977. On January 21, 1977, within the time prescribed by Rule 40, Fed. R. App. P., petitioners herein filed a Petition for Rehearing En Banc. Said Petition was denied by the court of appeals on February 2, 1977. This petition is, therefore, timely pursuant to 28 U.S.C. §2101 (c) in that the time period for filing did not begin to run until February 2, 1977. *Gypsy Oil Company v. Lee Bennett Escoe*, 275 U.S. 498 (1927); *United States v. Healy, et al.*, 376 U.S. 75 (1964). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 19 of this Court.

QUESTION PRESENTED

In reversing the decision of the district court, the court of appeals concluded that it was improper for the district court to dismiss the case brought under the Sherman Act, 15 U.S.C. §1 *et seq.*, for lack of subject matter jurisdiction prior to conducting a trial on the merits. As stated by the court of appeals,

> The question before us is whether the trial court without the benefit of a full evidentiary hearing could determine if the alleged misconduct of the defendants involved interstate commerce.
>
> . . .
>
> The trial judge in the case here, while recognizing the principle we have elucidated, unfortunately took the position that the "bare bones complaint . . . fleshed out by all the factual allegations which the defendants [*sic*] now assert they can prove . . ." furnished a sufficient basis for a definitive determination of the jurisdictional issue. We are of the opinion that this was an incorrect approach. The plaintiffs should have been permitted to produce all the evidence available to them before determining the effect-on-commerce issue. (App. A. at A2 and A4).

The question of law raised by this decision is whether a court of appeals may properly require a district court to conduct a full trial on the merits before determining the existence of subject matter jurisdiction in a case brought under the Sherman Act even if the district court, prior to trial, has a complete and uncontested factual record on which to predicate its decision. This question presents the subsidiary issues of whether a court of appeals can exclude a certain class of civil cases from the operation of Rules 12 and 56, Fed. R. Civ. P., whether a court of appeals can ignore and obviate pre-trial procedures established by a district court pursuant to Rule 16, Fed. R. Civ. P., and whether the application of the principle enunciated by the court of appeals constitutes an impermissible invasion into the province of district court decision making.

The decision of the Seventh Circuit Court of Appeals is in conflict with decisions of the United States Courts of Appeal for the Second, Fourth, Fifth, Eighth, Ninth and Tenth Circuits.

STATUTES AND RULES INVOLVED

Section 1 of the Sherman Act (15 U.S.C. §1) provides, in pertinent part, as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations is declared to be illegal . . .

Section 2 of the Sherman Act (15 U.S.C. §2) provides, in pertinent part, as follows:

> Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of . . .

Rule 1, Fed. R. Civ. P., provides as follows:

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 12, Fed. R. Civ. P., provides, in pertinent part, as follows:

> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter . . .
>
> (h) Waiver or Preservation of Certain Defenses.
>
> (3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Rule 16, Fed. R. Civ. P., provides, in pertinent part, as follows:

> Pre-trial procedure; formulating issues
>
> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;
>
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
>
> (4) The limitation of the number of expert witnesses;
>
> (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
>
> (6) Such other matters as may aid in the disposition of the action.

Rule 56, Fed. R. Civ. P., provides, in pertinent part, as follows:

> Summary Judgment
>
> * * *
>
> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

STATEMENT OF THE CASE

A. The Plaintiffs' Claims

This action was initiated on February 4, 1974 by the filing of a five count complaint by the plaintiffs, Leonard W. Sapp, Ralph Hurwitz and Charles Robbins, in the United States District Court for the Southern District of Illinois; no antitrust claims were asserted. On October 1, 1974, plaintiffs filed a ten count first amended complaint asserting claims under the federal antitrust law and state law and naming as defendants the petitioners herein. Jurisdiction was predicated on 28 U.S.C. §1311. The first amended complaint alleged that the plaintiffs owned a parcel of land (the "Sapp site") located in Springfield, Illinois and intended to construct thereon a shopping center. In January, 1973 plaintiffs entered into a joint venture agreement with the Hahn-Newman Development Corporation ("Hahn-Newman") to develop the proposed shopping center. The joint venture agreement provided that the plaintiffs could terminate the agreement if Hahn-Newman failed to get Sears to locate in the Sapp site.

It was further alleged by plaintiffs that thereafter, the defendant Springfield Joint Venture caused plaintiffs to terminate their joint venture agreement with Hahn-Newman by promising to plaintiffs that they could deliver Sears to the Sapp site and by offering to purchase 100 acres of the Sapp site. Plaintiffs alleged that Springfield Joint Venture then instead delivered Sears to a shopping center site being developed by defendant, Paul Barker, (the "White Oaks site"). Plaintiffs alleged that this activity was conducted as a result of a conspiracy among the defendants to destroy plaintiffs' attempt to develop a shopping center on the Sapp site and to monopolize the Springfield, Illinois shopping center market.

B. The Proceedings Below

After filing the first amended complaint, the plaintiffs engaged in extensive discovery including the following: the filing of seven sets of Interrogatories containing 175 separate questions; the filing of two requests for documents and two requests for admissions; and the participation in the depositions of 34 persons over a period of 53 days which generated 5,989 pages of transcript and approximately 400 exhibits.

On December 12, 1975 in accordance with the district court's Standing Order on Pre-trial Conferences, a final pre-trial conference was held at which the parties jointly filed their stipulation of uncontested facts, and each party filed and exchanged its concise summary of essential facts which the party expects to prove.[2] Each defendant thereafter moved for summary judgment or dismissal based on the district court's lack of subject matter jurisdiction. The motions were briefed and a full hearing on defendants' motions was held.

For purposes of defendants' motions, the defendants agreed to treat all of plaintiffs' well pleaded allegations as true. In its consideration of defendants' motions, the district court considered the amended complaint, the concise summary of essential facts which the plaintiffs expect to prove, and the statements made by plaintiffs in oral argument on defendants' motions (App. B. at A16, 17, 18 and 22).

On February 20, 1976, the district court dismissed the first amended complaint in its entirety for lack of subject matter jurisdiction on the Sherman Act claims and for lack of pendent jurisdiction on the state law claims (diversity of citizenship was absent).

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[2] Pertinent paragraphs from the plaintiffs' concise summary of essential facts which the party expects to prove are set forth in Appendix C hereto.

On January 7, 1977, the court of appeals reversed the decision of the district court and remanded the case for further proceedings. The ground for reversal was the impropriety of dismissing the action prior to a trial on the merits.

An examination of the court of appeals' decision discloses that the court of appeals has in effect created a rule that it is *per se* improper to dismiss a Sherman Act case for lack of subject matter jurisdiction prior to trial regardless of the type of record available to the district court at the pre-trial stage. That this is the holding of the court of appeals is supported by the following portion of the court's opinion:

> If we were to discuss the merits of these allegations on the basis of the present record, we would be committing the same error with which we charge the district court. Suffice it to say that *in light of the present law on the subject, we are convinced that a full evidentiary trial is required.* (Emphasis supplied) (App. A. at A6, 7).

The following statement from the concurring opinion of Judge Fairchild clearly demonstrates that the court of appeals has adopted a rule that it is *per se* improper to dismiss a Sherman Act case on jurisdictional grounds prior to trial:

> Though many courts have spoken of the question of the effect on interstate commerce of the conduct alleged to violate the Sherman Act as a question of subject matter jurisdiction of the court, . . . we believe the question is logically an element of the merits. (App. A. at A7).

REASONS FOR GRANTING THE WRIT

A. Summary of Reasons for Granting the Writ

The decision of the court of appeals, holding that a district court may not properly dismiss an action brought under the Sherman Act for lack of subject matter jurisdiction prior to conducting a trial on the merits,

(1) improperly excludes from the operation of the Federal Rules of Civil Procedure a specific class of civil cases,

(2) improperly ignores and obviates the pre-trial procedure established by a district court.

(3) improperly interferes with the determination by a district court of its jurisdiction, and

(4) conflicts with the decisions of other United States Courts of Appeal.

For each of these reasons, this Court should grant the Petition for Writ of Certiorari.

B. The Decision of the Court of Appeals Improperly Excludes from the Operation of the Federal Rules of Civil Procedure a Specific Class of Civil Cases

Rule 1, Fed. R. Civ. P., provides that the rules "govern the procedure in the United States district court in *all suits of a civil nature*" and that they "shall be construed to secure the just, speedy, and inexpensive determination of every action". By holding that it is improper for a district court to dismiss prior to trial a case brought under the Sherman Act for lack of subject matter jurisdiction, the court of appeals has effectively eliminated the application of Rules 12 and 56, Fed. R. Civ. P., for the pre-trial disposition of litigation in Sherman Act cases.

As stated by Judge Austin in *Gateway Associates, Inc. v. Essex-Costello, Inc.*, 380 F. Supp. 1089, 1094 (N.D. Ill. 1974):

> The law of this Circuit now seems to require the district courts to try antitrust cases on the merits before they may determine whether they even have the jurisdiction or power to do so. Obviously, this makes little sense and adds to the burgeoning caseload of the district courts.

In the present case discovery was completed and, pursuant to a standing pre-trial order in effect when the case was filed, the plaintiffs submitted a 28-page Summary of Essential Facts which the Party Expects to Prove. For purposes of defendants' Motions to Dismiss and for Summary Judgment, the defendants treated all of plaintiffs' well pleaded allegations as true. The plaintiffs had a final opportunity to present additional evidence on the question of jurisdiction at the oral hearing held by the district court.

In short, the district court had a complete and uncontested factual record on which to consider the issue of subject matter jurisdiction. If the court of appeals concluded that on this record it was improper to determine jurisdiction prior to trial, then Judge Austin's interpretation of the law in the Seventh Circuit is correct and a district court may not dismiss a case brought under the federal antitrust laws for lack of subject matter jurisdiction prior to a trial on the merits.

This requirement flagrantly disregards the plain meaning and intent of the Federal Rules of Civil Procedure and constitutes judicial rulemaking. The Federal Rules of Civil Procedure have the effect of law. *See*, WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil §1030; *Winsor v. Daumit*, 179 F.2d 475 (7th Cir. 1950); *Johnson v. Harper*, 66 F.R.D. 103 (E.D. Tenn. 1975). Rules 12 and 56, Fed. R. Civ. P., provide the procedural vehicle by which a district court can dispose of litigation at a pre-trial stage where an insurmountable defect exists which bars further proceedings such as lack of subject matter jurisdiction.

Federal courts may not disregard particular rules of the Federal Rules of Civil Procedure, *Bowles v. Sebastopol Berry Growers Association*, 5 F.R.D. 178 (N.D. Cal. 1946).

In light of the court of appeals decision, a defendant will be forced to trial on an antitrust case no matter how tenuous the nexus between the alleged restraint on trade and interstate commerce. Obviously, this *per se* rule adopted by the court of appeals does not further the goals of the Federal Rules of Civil Procedure to provide a "just, *speedy*, and *inexpensive* determination of every action" Rule 1, Fed. R. Civ. P. (Emphasis supplied).

C. The Decision of the Court of Appeals Improperly Ignores and Obviates the Pre-Trial Procedure Established by a District Court

As previously noted, pursuant to its Standing Order on Pre-Trial Conferences, the district court in this action ordered the parties to prepare a stipulation of uncontested facts and a concise summary of essential facts which the party expects to prove. At a final pre-trial conference held on December 12, 1975, these documents were submitted to the district court. Based upon the plaintiffs' lengthy summary of essential facts, the defendants moved to dismiss the action or for summary judgment. The defendants' motions were predicated on the failure of plaintiffs to allege facts sufficient to establish a nexus between their claims and interstate commerce. The district court, after reviewing the "pre-trial documents", the complaint, the plaintiffs' briefs, and the oral declarations made by the plaintiffs at the hearing on defendants' motions, concluded that it lacked subject matter jurisdiction and dismissed the case.

In short, the pre-trial procedures invoked by the district court performed the precise function intended for them. As stated at 3 MOORE'S FEDERAL PRACTICE ¶16.02,

> One of the prime purposes of the Federal Rules is to expedite the disposition of cases and lessen the cost of litigation. This is indicated in Rule 1. The second sentence thereof provides that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." *The pre-trial conference under Rule 16 plays an important part in achieving this purpose.* (Emphasis supplied; footnotes omitted).

In *Nelson v. Keefer,* 451 F.2d 289 (3d Cir. 1971) the court of appeals affirmed the dismissal of a personal injury action because of plaintiffs' inability to show at a pre-trial conference that they could satisfy the jurisdictional amount. In so holding, the court of appeals noted,

> . . . we find that the district court gave plaintiffs ample opportunity, at the pre-trial stage, to justify their jurisdictional claim. 451 F.2d at 298.

Similarly, in the present case the district court's pre-trial procedure gave the plaintiffs every opportunity to set forth the necessary jurisdictional allegations regarding interstate commerce. The district court quite properly used its authority under Rule 16, Fed. R. Civ. P., to narrow the issues and to determine whether it had jurisdiction. The holding of the court of appeals undermines the pre-trial procedure adopted by the district court and turns the district court's pre-trial procedure into a futile exercise. If pre-trial procedures are to have any efficacy in the federal judicial system, courts of appeal must not inhibit the purposes for which the pre-trial procedures may be used. When, through the use of pre-trial procedures, a fatal deficiency in the plaintiff's case is discovered, a district court must be permitted to conclude the litigation prior to trial so as to fulfill the directives of the Federal Rules of Civil Procedure.

D. The Decision of the Court of Appeals Improperly Interferes with the Determination by a District Court of its Jurisdiction

The question of whether a district court has subject matter jurisdiction in a case brought under the Sherman Act necessarily requires that the district court be empowered to make a discretionary determination, based on the evidence before it, of whether the alleged violation has the requisite nexus with interstate commerce. The time at which the district court makes this determination must also be left to the discretion of the district court. *cf., Budde v. Ling-Temco-Vought, Inc.,* 511 F.2d 1033 (10th Cir. 1975) (considering a district court's discretion to dismiss a case for lack of *in personam* jurisdiction).

Indeed the ruling by the court of appeals that a dismissal for lack of subject matter jurisdiction must await a trial on the merits flies squarely in the face of the mandate contained in Fed. R. Civ. P. 12(h)(3) that "*whenever* it appears . . . that the court lacks jurisdiction of the subject matter, the court *shall dismiss* the action". (Emphasis supplied). As stated in *Safeguard Mutual Insurance Company v. Commonwealth of Pennsylvania,* 372 F. Supp. 939, 946 (E.D. Pa. 1974).

> Moreover, when a Federal District Court decides that jurisdiction is lacking, at any time after a suit is brought, it has no authority to proceed further with an adjudication of the issues on their merits; the Court must dismiss the suit. *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 56 S. Ct. 780, 80 L. Ed. 1135 (1936); *Tanzimore v. Bethlehem Steel Corporation,* 457 F.2d 1320 (3rd Cir. 1972); *Barkhorn v. Adlil Associates, Inc.,* 345 F.2d 173 (9th Cir. 1965); *Bevan v. Columbia Broadcasting System, Inc.,* 293 F. Supp. 1366 (S.D.N.Y. 1968); *Twardzik v. Sepauley,* 286 F. Supp. 346 (E.D.Pa. 1968); *Strauss v. Interna-*

tional Brother. of Teamsters, Etc., 179 F. Supp. 297 (E.D.Pa. 1959). (Footnote omitted).

In effect the decision of the court of appeals requires a district court to ignore the fact that it lacks subject matter jurisdiction in a suit brought under the Sherman Act, regardless of the sufficiency of the record before the court, until a trial is completed. It is clear that district courts in the Seventh Circuit have grave doubts about this imposed limitation on their discretion. *See, Gateway Associates, Inc. v. Essex-Costello, Inc., supra.* In fact, the district court opinion in this case has already been cited with approval by the United States District Court for the Southern District of Indiana in *Universal Services of Indiana v. Central Waste Systems*, 5 Trade Reg. Rep. (1977-1, Trade Cas.) ¶61,244, for the proposition that a pre-trial dismissal of a Sherman Act case for lack of subject matter jurisdiction is appropriate.

E. The Decision of the Court of Appeals Conflicts with the Decisions of other United States Courts of Appeal

The effective holding by the court of appeals that it is *per se* improper to dismiss a Sherman Act case for lack of subject matter jurisdiction prior to trial, even if the trial court has a *complete* and *uncontested* factual record on which to base its decision, conflicts with decisions of the United States Courts of Appeal for the Second, Fourth, Fifth, Eighth, Ninth and Tenth Circuits. In *Rosemound Sand and Gravel Company v. Lambert Sand and Gravel Company,* 469 F.2d 416 (5th Cir. 1972), the plaintiff brought suit under the Clayton Act and Robinson-Patman Act. The defendant moved to dismiss the action pursuant to Fed. R. Civ. P. 12 (b) (1) and the district court granted the defendant's motion. In affirming the dismissal, the Fifth Circuit Court of Appeals noted that the plaintiff had

a full hearing on the motion and was permitted ample time for discovery. The Fifth Circuit concluded,

> On this record we cannot say that Rosemound was foreclosed from submitting all of the jurisdictional facts to the court. The court's decision on the question of subject matter jurisdiction prior to trial was therefore not an abuse of discretion under Fed. R. Civ. P. 12(d) 469 F.2d at 418.

Accord, Mims v. Kemp, 516 F.2d 21, 23 (4th Cir. 1975).

In *Diversified Brokerage Services, Inc. v. Greater Des Moines Board of Realtors*, 521 F.2d 1343 (8th Cir. 1975), the Eighth Circuit Court of Appeals affirmed the dismissal by the district court of plaintiff's action brought under the Sherman Act for lack of subject matter jurisdiction. In so holding, the Eighth Circuit noted as follows:

> Appellants initially requested a jurisdictional ruling on December 22, 1972, when they sought a ruling that the complaint stated a cause of action for a *per se* violation of the Sherman Act. Although the district court eventually denied this motion, the defendants filed, on November 28, 1973, a motion to dismiss for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b). On February 13, 1974, the court reserved its ruling on the motion but set a pre-trial conference at which the plaintiffs were to reveal all of their evidence that they expected to rely on to satisfy the interstate commerce requirements of the Sherman Act. At the pre-trial conference on April 19, 1974, the plaintiffs presented their affidavit, discussed earlier in our opinion, reciting that five real estate transactions had involved buyers from out-of-state and that several prospective sellers intended to move out-of-state.
>
> Under these circumstances, where appellants were given ample opportunity to present evidence on the interstate nexus and afforded a full opportunity for discovery, we do not believe it would be appropriate

for us to now remand this case to the district court for further proceedings. 521 F.2d at 1347.

In *Gough v. Rossmoor Corporation*, 487 F.2d 373 (9th Cir. 1973), the Ninth Circuit Court of Appeals explored the role which the district court should play in determining the issue of subject matter jurisdiction in a case brought under the Sherman Act. The court stated.

> It is doubtful whether the jurisdictional issue should have been submitted to the jury, even had the evidence been in dispute. Except where the jurisdictional issue and the issues on the merits are factually "completely intermeshed," *McBeath v. Inter-American Citizens for Decency Committee*, 374 F.2d 359, 362-363 (5th Cir. 1967), it may well be the court's function to resolve factual disputes relevant to jurisdiction on motion under Rule 12(b)(1), Fed. R. Civ. P., rather than the jury's function to resolve such disputes in the trial of the case on the merits. 487 F.2d at 377.

See also, Wolf v. Jane Phillips Episcopal-Memorial Medical Center, 513 F.2d 684 (10th Cir. 1975); *Page Publishing Co. v. Work*, 290 F.2d 334 (9th Cir. 1961), *cert. den.*, 368 U.S. 875 (1961); *Lieberthal v. North Country Lanes, Inc.*, 332 F.2d 269 (2d Cir. 1964). (In each case the court of appeals affirmed a district court dismissal of an action brought under the Sherman Act for lack of subject matter jurisdiction.)

The most recent pronouncement by this Court on the question of a pre-trial dismissal of a Sherman Act case for lack of subject matter jurisdiction came in *Hospital Building Co. v. Trustees of Rex Hospital*, ___ U.S. ___, 96 S. Ct. 1848 in which Justice Marshall, writing for the Court, concluded,

> . . . in antitrust cases, where "the proof is largely in the hands of the alleged conspirators," . . . dismissals

> *prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.* (Emphasis supplied).

This statement clearly implies that dismissals prior to trial remain a viable procedural device in antitrust cases. It must be noted that in the present case the plaintiffs not only conducted extensive discovery, but were also given every opportunity to buttress their jurisdictional claim. Indeed at no time have plaintiffs ever intimated what additional facts might have been discovered at trial to give the district court subject matter jurisdiction.

The fact that the court of appeals decision conflicts with other United States Courts of Appeal and may well conflict with the decision of this Court in *Hospital Building Co. v. Trustees of Rex Hospital, supra.*, necessitates the grant of petitioners' Petition for Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

ORDER OF THE COURT OF APPEALS

(Dated January 7, 1977)

No. 76-1455

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

January 7, 1977

Argued December 8, 1976

LEONARD W. SAPP, RALPH HURWITZ and CHARLES ROBBINS,
Plaintiffs-Appellants,

vs.

RICHARD E. JACOBS, *et al.*,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS,
NORTHERN DIVISION.
No. S-CIV-74-14
ROBERT D. MORGAN, *Judge*

Before
HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*

ORDER

The amended complaint alleges violations of the Sherman Act and asks treble damages in excess of eight million dollars. The original complaint also alleged causes of action, based on diversity jurisdiction, sounding in tort

and breach of contract; complete diversity is not present, however, so that their survival as pendent claims under the amended complaint depends on whether there is a jurisdictional basis for the alleged antitrust violations.

On a motion for summary judgment filed by one defendant and motions to dismiss filed by all other defendants, the district court dismissed the complaint for a lack of Sherman Act subject-matter jurisdiction. After considering the record on appeal, the briefs, and the oral arguments by counsel, we have concluded that the dismissal was improvident. The reasons for our conclusion follow.

The question before us is whether the trial court without the benefit of a full evidentiary hearing could determine if the alleged misconduct of the defendants involved interstate commerce.

As the trial judge recognized, *A. Cherney Disposal Co. v. Chicago & Sub. Refuse Dis. Ass'n*, 484 F.2d 751 (7th Cir. 1973), supplies certain criteria for determining whether interstate commerce is involved short of a full evidentiary trial. In that case we said, quoting *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517 (9th Cir. 1973): "In essence, the test is whether '[t]he facts of the particular situation . . . determine . . . [that the] relationship to interstate commerce is too tenuous in a practical sense to warrant federal control.' We hold that such a conclusion can better be determined after a thorough exploration of all evidence that either side can produce, rather than by a motion to dismiss . . . ."

Many courts, including the Supreme Court, have stressed the idea that the factual aspects of interstate commerce effects is usually so intertwined with the merits of the case that the jurisdictional issue should not be decided summarily. In *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464,473 (1962), Mr. Justice Clark wrote:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

In *McBeath v. Inter-American Citizens for Decency Committee*, 374 F.2d 359 (5th Cir. 1967), the Fifth Circuit reversed a district court dismissal of an antitrust action on jurisdictional grounds saying:

> [W]here the factual and jurisdictional issues are completely intermeshed the jurisdictional issues should be referred to the merits, for it is impossible to decide the one without the other. In Land v. Dollar, 330 U.S. 731 (1947), the Supreme Court recognized that there were types of cases "where the question of jurisdiction is dependent on decision of the merits. . . ."
>
> The question of jurisdiction here, including the existence of a conspiracy and a boycott or secondary boycott and their significant effect on interstate commerce, is so inextricably connected with the merits of the case itself that it was error for the court to determine that it lacked jurisdiction, thereby dismissing the suit, without according McBeath a full opportunity to prove his case on the merits, particularly considering the incomplete record and the paucity of evidence before the court. 374 F.2d at 363.

This principle was reiterated in *Stavrides v. Mellon National Bk & Tr. Co.*, 353 F.Supp. 1072 (W.D. Pa. 1973), *aff'd*, 487 F.2d 953 (3d Cir. 1973):

> Where, as here, jurisdictional issues rest on factual disputes the plaintiffs should have an opportunity to

prove that the practices in question do have a substantial effect on interstate commerce. 353 F.Supp. at 1076.

The trial judge in the case here, while recognizing the principle we have elucidated, unfortunately took the position that the "bare bones complaint . . . fleshed out by all the factual allegations which the defendants [*sic*] now assert they can prove . . ." furnished a sufficient basis for a definitive determination of the jurisdictional issue. We are of the opinion that this was an incorrect approach. The plaintiffs should have been permitted to produce all the evidence available to them before determining the effect-on-commerce issue.

In rendering his decision to dismiss the complaint for lack of subject-matter jurisdiction, the trial judge did not have the benefit of the recent Supreme Court decision in *Hospital Building Co. v. Trustees of Rex Hospital,* ___ U.S. ___ (44 U.S.L.W. 4683, May 24, 1976). There the plaintiff operated a hospital in Raleigh, North Carolina. The defendants maintained a hospital in the same city. The plaintiff alleged the defendants conspired to block the expansion of its hospital, thereby monopolizing the compensated medical and surgical services in the Raleigh area. The district court held, and the Fourth Circuit affirmed *en banc*, that the plaintiff failed to allege facts sufficient to state the requisite effect upon commerce as required by the Sherman Act. The Supreme Court reversed. In so doing, the Court confirmed the general proposition that if interstate commerce is in some substantial way shackled by local activities, the necessary nexus for a Sherman Act violation is supplied. Mr. Justice Marshall, speaking for a unanimous Court, said:

> The Sherman Act prohibits every contract, combination or conspiracy "in restraint of trade or commerce among the several States," 15 U.S.C. § 1, and

> prohibits monopolizing "any part of the trade or commerce among the several States." 15 U.S.C. § 2. It is settled that the Act encompasses far more than restraints on trade that are motivated by a desire to limit interstate commerce or that have their sole impact on interstate commerce. "[W]holly local business restraints can produce the effects condemned by the Sherman Act." *United States v. Employing Plasterers Assn.*, 347 U.S. 186, 189 (1954). As long as the restraint in question "substantially and adversely affects interstate commerce," *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. at 234, the interstate commerce nexus required for Sherman Act coverage is established. " 'If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' " *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. at 195, quoting *United States v. Women's Sportswear Manufacturers Assn.*, 336 U.S. 460, 464 (1949). 44 U.S.L.W. at 4684.

In *Hospital*, the plaintiff identified several areas in which the business was involved with interstate commerce: the purchases of medicines and supplies from out-of-State sellers; the payment of a management service fee to a corporation based in Georgia; a portion of its revenue derived from out-of-State insurance companies; and plans to finance the proposed extension of facilities through out-of-State lenders. The Court said that "[t]his combination of factors is certainly sufficient to establish a 'substantial effect' on interstate commerce under the Act."

After the decision in *Hospital* came down, the Third Circuit decided *Evans v. S. S. Kresge Co.*, ___ F.2d ___ (3rd Cir., Nov. 2, 1976). There a grocer, operating two food stores, entered into a license agreement with Kresge, which permitted the use of its trade name "K-mart." The grocer claimed that the agreement violated the Sherman

Act. The district court dismissed the action on jurisdictional grounds, ruling that the plaintiff had failed to show sufficient impact on interstate commerce. The Third Circuit reversed on the basis of *Hospital*.

Plaintiffs in the instant case listed four areas in which they assert interstate commerce was affected. We recite verbatim from the complaint:

> 14. Either the proposed shopping center development by plaintiffs of the Sapp-Hurwitz-Robins Site or the development of the White Oaks shopping center and the subsequent operation of said shopping center or centers would substantially affect interstate commerce in that:
>
> A. Millions of dollars in goods and merchandise would be shipped in interstate commerce into said shopping center or centers annually;
>
> B. Substantial amounts of goods and merchandise would be shipped out of said shopping center or centers into interstate commerce annually;
>
> C. Interstate travelers would purchase goods and merchandise and transport same to other states; and
>
> D. Railroads, freight carriers, express companies and other vehicles for transporting goods in interstate commerce would be utilized in moving goods and merchandise into and away from said shopping center or centers.
>
> 15. The actions of defendants and the conspiracy between them were undertaken to restrain trade in interstate commerce, destroying potential competition and substantially affecting interstate commerce all in violation of Title 15, USC §1 of the laws of the United States.

If we were to discuss the merits of these allegations on the basis of the present record, we would be committing the same error with which we charge the district judge. Suf-

fice it to say that in light of the present law on the subject, we are convinced that a full evidentiary trial is required.

After the dismissal of the complaint was announced, plaintiffs proffered an amended complaint in an attempt to supply the deficiencies detected by the trial court. The court refused to permit the filing. We believe this was an abuse of discretion and that the permission should have been granted.

The dismissal order is reversed and the case is remanded for further proceedings.

FAIRCHILD, *Chief Judge*, concurring.

Though many courts have spoken of the question of the effect on interstate commerce of the conduct alleged to violate the Sherman Act as a question of subject matter jurisdiction of the court (see opinions cited in the body of this order), we believe the question is logically an element of the merits. For it has long been settled that the federal courts have subject matter jurisdiction whenever a plaintiff asserts a federally-created cause of action. P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart & Weschsler's The Federal Courts and the Federal System* at 883 (2d ed. 1973). Certainly then, the courts have subject matter jurisdiction over any Sherman Act claim.

Whether a decision that there is an insufficient effect on interstate commerce be made on the face of the complaint, or on motion for summary judgment, or after trial, such decision is one on the merits after jurisdiction has been assumed. *Cf. Bell v. Hood*, 327 U.S. 678, 682 (1945).

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING

(Dated February 2, 1977)

No. 76-1455

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

LEONARD W. SAPP, RALPH HURWITZ, and CHARLES ROBBINS,
Plaintiffs-Appellants,

vs.

RICHARD E. JACOBS, *et al.*,
Defendants-Appellees.

Before
HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS,
SPRINGFIELD DIVISION
No. S-Civ.-74-14

On consideration of the petition for rehearing and suggestion that it be reheard *in banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

Judges Tone and Wood disqualified themselves from any consideration of the petition.

APPENDIX B

DECISION AND ORDER OF THE DISTRICT COURT

(Filed February 20, 1976)

No. S-CIV-74-14

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

LEONARD W. SAPP, RALPH HURWITZ, and CHARLES ROBBINS,
Plaintiffs,

v.

RICHARD E. JACOBS, DAVID H. JACOBS, DOMINIC VISCONSI, R. F. COFFIN, and EDWARD H. CRANE, individually and as partners d/b/a SPRINGFIELD JOINT VENTURE, a partnership; SEARS, ROEBUCK & CO., a corporation; PAUL BARKER; and MAY DEPARTMENT STORES CO., a corporation,
Defendants.

DECISION AND ORDER

This cause arises upon a multi-count, civil complaint, grounded upon the Sherman Anti-Trust Act, 15 U.S.C. 1, et seq., and upon Illinois substantive law. The cause is now before the court upon motions by the several defendants to dismiss the antitrust counts of complaint for the reason that subject matter jurisdiction is absent.[1]

The plaintiffs, who are Illinois citizens, are the owners of all beneficial interest in a real estate trust embracing 154 acres of land in the vicinity of the city of Springfield, Illinois. The defendants, Richard E. Jacobs, David H.

[1] The motion of defendant May for summary judgment rests upon the contention that subject matter jurisdiction is absent. That motion is deemed by the court to be a motion to dismiss.

Jacobs, Dominic Visconsi, R. F. Coffin, and Edward H. Crane, all citizens of states other than Illinois, are partners, doing business as Springfield Joint Venture (hereinafter, collectively, "SV"). Defendant Paul Barker is a citizen of Illinois, who is engaged, *inter alia*, in the development of White Oaks Shopping Center at Springfield. Defendant Sears, Roebuck & Co., hereinafter "Sears," is a New York corporation, engaged, both interstate and intrastate, in the merchandising of myriad lines of consumer goods through a large chain of retail outlets. Defendant May Department Stores Co., hereinafter "May," is a New York corporation which is likewise engaged, both interstate and intrastate, in the sale of consumer goods through a substantial number of retail outlets.

Of the ten counts of complaint, Counts II, VIII, IX and X are grounded upon the federal antitrust laws. The remaining six counts are grounded upon Illinois substantive law.

Historic Perspective of Those Motions

The complaint had its genesis in the competing efforts between the plaintiffs and defendant Barker to develop a regional shopping center in the Springfield, Illinois, market area. The success of such a venture is conceded to depend upon the obtaining of occupancy commitments from major retailers, which success is then expected to promote lease agreements for mall shops, etc., from smaller and less prestigious retailers. In this case, all parties deemed Sears to be the key to success or failure. Ultimately, Sears decided to enter into an agreement with Barker to locate in his White Oaks Center. The alleged result was that plaintiffs were then unable to realize the expectation of development of a regional center upon the lands which they own.

Following discovery and pre-trial procedures, the cause was scheduled for trial to commence on January 14, 1976. Up to and including the final pre-trial conference, there had been no challenge to jurisdiction to the antitrust counts by the defendants.[2]

Pursuant to this court's Standing Pre-trial Order, the plaintiffs filed their pre-trial statement, which contained the statement of their theory of the case, as exemplified by the issues presented, and their statements as to the essential facts which they deemed provable and supportive of their right to judgment in their favor.

The May motion for summary judgment upon the antitrust counts against it was prompted by that factual statement by the plaintiffs. Thus, May took the position that all facts stated by plaintiffs, if true, do not provide a basis for federal jurisdiction to attach under the antitrust laws, that there remains no genuine issue as to any material facts, and that it is entitled to summary judgment in its favor. The subsequently filed motions by other defendants to dismiss the complaint stress the same factual statement, as well as all admissions and sworn materials before the court, for the position that such facts, assumed to be true, reveal that there is no subject matter jurisdiction under the antitrust laws.

The scheduled trial was continued pending disposition of the several motions on jurisdiction. Briefs have now been filed by all parties and oral argument has been heard.

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[2] At an earlier time when motions directed against the state law counts were before the court, it seemed apparent that there was reason to ponder the question whether federal jurisdiction was stated in the bare-bones antitrust counts. It also seemed possible that the bare-bones allegations might be fleshed out by substantive proof to bridge that seeming deficiency. Because the question was not presented to the court at that time, it was not then considered. The instant motions arise in a context which is quite different.

The cause is before the court upon the file as thus, historically, postured.

The Complaint

All counts of the Complaint arise out of the same alleged, operative facts which are summarized as follows: At all material times the plaintiffs were actively endeavoring to develop their land as a commercial shopping center. At the same time, the SV defendants were seeking to locate a shopping center in the vicinity of Springfield, and Barker was seeking to develop a shopping center upon lands which he owned or controlled, also in the Springfield area. On January 26, 1973, plaintiffs entered into two agreements with one Hahn-Newman Development Corporation, as follows:

a. A joint venture agreement for development of plaintiffs' site as a commercial shopping center; and

b. An agreement that plaintiffs had the option of terminating the joint venture agreement within thirty days of the date thereof if the plaintiffs found that Sears would not locate a retail department store in the shopping center project anticipated by that agreement.

In February, 1973, representatives of SV contacted plaintiffs, proposing to purchase 100 acres of the site for shopping center development. SV advised plaintiffs that they had a close relationship with Sears and that Sears would not locate in the center proposed to be developed by plaintiffs and Hahn-Newman. Plaintiffs exercised their option to terminate, and did terminate the Hahn-Newman agreement. On February 28, 1973, they entered into an agreement with SV for the sale to SV of 100 acres of the site for the sum of $2,000,000. Subsequently, both Sears

and defendant May elected to locate retail outlets in Barker's proposed White Oaks Center. SV then refused to perform their contract for land purchase. Prior to the commencement of this suit, SV filed a suit in the Circuit Court of Illinois, at Springfield, to recover the earnest money paid under their contract with plaintiffs. Plaintiffs filed a counterclaim in that suit for breach of contract.

At the outset of their efforts at commercial development, plaintiffs' real estate was zoned in a residential classification. The real estate was rezoned for commercial development by the city of Springfield, with the proviso in the rezoning ordinance that the classification would revert to the residential classification unless commercial construction was commenced within a period of two years after the effective date of the amendatory ordinance. Finally, it is alleged that plaintiffs' real estate has a market value in excess of $20,000 per acre under a commercial classification, compared to a value of about $4,000 per acre under the residential zoning classification to which it has now reverted.

In the context of the antitrust counts, the complaint alleges that all of the defendants did conspire together to "deliver" Sears to the competing Barker development, and that as a result of that conspiracy, plaintiffs were prevented from developing their land for their proposed commercial purpose. It is further alleged that the restraint thus imposed did affect interstate commerce because "millions of dollars in goods and merchandise would be shipped in interstate commerce" annually to a regional center in the Springfield market area, and that the movement of such merchandise would involve the use of interstate carriers.[3]

[3] Alternative allegations that substantial goods would be shipped out of such a center annually and that merchandise would be sold therein to interstate travelers are now abandoned by the plaintiffs.

In the context of the present motions, the complaint is deemed to include the allegations of all essential facts which plaintiffs state that they would prove and their definition of the interstate commerce effect as reflected in their answers to interrogatories.[4]

Since filing their statement of essential facts, plaintiffs have expanded their antitrust theory. Thus, they assert in their brief that they would produce evidence that they had been continuously engaged for some two years, up to and including April, 1973, in soliciting agreements from citizens of states other than Illinois for occupancy of their proposed shopping center.[5] Though they stated in their

[4] In their summary of the essential facts which they would prove at trial, plaintiffs stated:

a. That up to the present time, there is no regional shopping center located in the Springfield market area;

b. That the "Springfield market area" encompassed the city of Springfield, together with a surrounding area having a radius of from 40 to 50 miles in all directions from the city;

c. That the competing development, White Oaks Shopping Center, "when it opens," is anticipated to house five major retail establishments, including Sears and May, in addition to appended mall shops;

d. That gross retail sales at White Oaks can reasonably be anticipated to exceed $50,000,000 annually when the center is opened; and

e. That in excess of 50% of all merchandise retailed at White Oaks will reach the center through interstate commerce, transported by interstate carriers.

Plaintiffs, by their answers to interrogatories, defined the commodities and market in which they alleged restraint of interstate commerce as follows:

> "The market in which trade was restrained was Springfield, Illinois, and the area forty to fifty miles in all directions from it. The trade restrained was: (i) the retail trade in all classes of merchandise; (ii) department stores and shopping centers; (iii) the furnishing of store space and facilities in a shopping center to commercial occupants thereof."

[5] Defendant Barker argues that plaintiffs cannot claim that they were so engaged up until April, 1973, because they had voluntarily removed themselves from the development effort on February 28, 1973, when they entered into a contract with SV

(Footnote continued on following page)

brief that their complaint had not relied upon "the construction aspects" of "the proposed shopping centers involved" as having any "supposed impact" on interstate commerce, they nevertheless asserted in oral presentation that such an impact did exist in the premises.[6] Those allegations are likewise accepted to complete the totality of flesh with which the bare-bones complaint is now adorned.

Solely for the purpose of considering these motions in that light, the court assumes the facts to be true, that the several defendants did conspire together as alleged in the complaint to thwart plaintiffs' efforts to develop a shopping center, and that that concerted action did preclude the fruition of the plaintiffs' plans. It also assumes, without so deciding that such acts would be a violation of the Sherman Act if interstate commerce was either directly involved or substantially affected thereby.

It further accepts as true all other allegations of the antitrust counts embellished as above delineated. Such are summarized as follows. Plaintiffs' land remains undeveloped. They gave up their planned development when it became apparent that Sears and other major retail outlets would locate in White Oaks, and when SV renounced their purchase agreement. There are to date no regional shopping centers in the Springfield market area, though White Oaks is now under construction. That market area, as defined by plaintiffs, lies wholly within the state of Illinois. The White Oaks Center, when opened,

(Continued from previous page)

to sell their real estate outright to those defendants. Though there be seeming logic in that argument, the complaint must nevertheless be construed as alleging that plaintiffs' development efforts did thereafter continue.

[6] To some degree that theory is contradictory of a basic theory of complaint; namely, that an object of the conspiracy

(Footnote continued on following page)

will be anticipated to generate a substantial volume of retail sales, and a very substantial part of the merchandise sold will reach the center and that market from other states through instrumentalities of interstate commerce. For a period of time extending until April, 1973, plaintiffs were actively negotiating with potential retail tenants in states other than Illinois, with the object of obtaining commitments for their occupancy of plaintiffs' proposed center.

To some degree, those accepted facts partake of admissions by plaintiffs against their own interest. Though that course is doubtless justified in any event, this court's Standing Pre-trial Order charges each party, in advance of trial, to file a concise summary of the essential facts which such party expects to prove at trial. It was incumbent upon the plaintiffs to state all essential facts, including facts reflecting the existence of the court's jurisdiction. It is assumed that the plaintiffs did state all essential facts which they would prove and that they vouch for the veracity of the facts which they do state. The effect of the standing order notwithstanding for purposes of this motion, the court has not precluded the subsequent, factual embellishment of the statement of "essential facts" which plaintiffs filed.

The file herein now reflects a status of claim at which the bare-bones complaint merely hints; namely, that any effect upon interstate commerce in the premises must derive from one or both of two factual expectations, to-wit:

a. The ultimate development, intrastate, of a regional shopping center, or

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(Continued from previous page)

was to cause Sears to reject plaintiffs' proposed center, that the conspiracy did achieve that objective, and that plaintiffs were thereby precluded from realizing their development efforts. Thus, plaintiffs' basic theory was that development could not be successful without Sears as a tenant, and that only one of the two competing sites could be developed, in any event.

b. The fact that a large proportion of the retailed merchandise anticipated to be marketed at such a center will in the future reach that market through channels of interstate commerce.

The Propriety of These Motions

Plaintiffs do suggest the untimeliness of these motions, in view of the substantial expense and effort thus far devoted to discovery and trial preparation. However, their suggestion is tempered by their necessary acceptance of the hornbook rule that subject-matter jurisdiction cannot be created by the consent of parties litigant and the necessary corollary thereto that the question can be raised at any state of litigation.

Though the statement of that rule suffices to dispose of any suggestion as to timeliness, another consideration must be recognized for its effect upon timing in this case. The decision in *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n.*, 484 F.2d 751 (7 Cir. 1973), may well be interpreted to discourage or, perhaps, prohibit a motion to dismiss a "bare-bones" complaint in any antitrust suit. Regardless of the efficacy to the last observation, it does appear, in the light of *Cherney*, that the discreet practitioner might now well await the fleshing out of the notice complaint by facts developed through discovery before he would ever assert the jurisdictional question.

Moreover, one is left with the impression, from reading the myriad cases, that there is in this judicial sphere a considerable degree of court-generated confusion between the substantive question of Sherman Act violation and the procedural question of Clayton Act jurisdiction. One recent example of that phenomenon is presented by the opinion in *Evans v. S. S. Kresge Co.*, 394 F. Supp. 817 (W.D. Pa. 1975), which, in turn, merely reflects the con-

fusion of other courts at other times. There is reflected a seeming failure to differentiate the necessary distinction between the minimum factual allegations necessary to invoke a court's jurisdiction and the quantum of proof required to prove a substantive violation when that jurisdiction is invoked. One result of such confusion, which is inherent in the present context, and which threads its way into some reported decisions, is the wholly untenable argument by the plaintiffs that the jurisdictional question must be presented to the jury as the trier of fact. The question of its own jurisdiction can be decided only by the court. *Gilbert v. David*, 235 U.S. 561 (1915); *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 469 F.2d 416, 418 (5th Cir. 1972). Conceding the existence of the power to act, then the trier of fact is the competent body to decide the substantive issues.

Unquestionably, the substantive and jurisdictional issues may frequently be so factually interwoven in an antitrust case that a consideration of all available evidence may be necessary before either issue can be decided. In such event, decision of the jurisdictional question must still remain a function of the court. This court considers that that consideration is the rationale of *Cherney*. If, instead of resolving disputed facts to dismiss a complaint, the trial judge had directed a verdict upon his determination at the close of the evidence that jurisdiction was lacking, would the Court of Appeals have reversed the decision? That supposed result seems unlikely.

Thus, it is not deemed that the *Cherney* case supports the statement in *Gateway Associates, Inc. v. Essex-Costello, Inc.*, 1974-2CCH Trade Cases 75, 231 (N.D. Ill. 1974), that the law of the Seventh Circuit now seems to require that a trial court must conduct a trial upon the merits of every antitrust case before it can even consider

the question whether it does have jurisdiction to conduct the trial.[7]

Because heavy reliance is placed by plaintiff on *Cherney*, and because it is felt that that case is clearly distinguishable from this, analysis of *Cherney* is undertaken here. The complaint there alleged that the defendants, including a large interstate association of refuse collectors and two suppliers of refuse equipment, had conspired together to monopolize the refuse disposal market in the area of Chicago, Illinois, and in closely adjacent areas of Indiana and Wisconsin. It alleged that such collusive activities included price fixing, refusal to deal with the plaintiffs, market allocations and group boycotts. 484 F.2d at 752, n.l. Motions for summary judgment were filed by the defendants. Such motions were supported by affidavits and opposed by counter-affidavits filed by the plaintiffs. Ultimately, the court construed the motions to be motions to dismiss. It dismissed the complaint for lack of subject matter jurisdiction. In reversing that judgment, the court said that it had involved the decision of disputed questions of fact which could not be decided on a motion to dismiss. *Ibid* at 755-758. In that context the court distinguished the *Lieberthal* case, *infra*, for the reason that that decision rested upon "*uncontested*" allegations of fact (emphasis in court's opinion) which the court accepted as true, not upon the resolution of disputed questions of fact. *Id.* at 756. Concluding, the court said that, upon the record be-

[7] The court said: "The law of this Circuit now seems to require the District Court to *try* antitrust cases on the merits before they may determine whether they even have the jurisdiction or power to do so." 1974-2CCH Trade Cases, at 92, 541. (Emphasis by the court.)

Because of the emphasis by the court, that statement can be construed as a left-handed criticism of *Cherney*, rather than an interpretive statement of judicial opinion. In either event, the statement is deemed to be an unwarranted interpretation of *Cherney*.

fore it, "we must here * * * consider all evidence tendered in support of the plaintiffs' asserted cause of action, to determine if under any possible theory they have plead facts" sufficient to resist either a motion for summary judgment or a motion to dismiss for lack of jurisdiction. And, further, that "on the record before us," the motion should not have been granted "because it required a weighing of facts disclosed in the pleadings and affidavits * * *." *Id.* at 759-760.

Despite plaintiffs' protestations to the contrary, there are no material disputed fact questions before the court in this cause. They do allude to evidence which they can bring to bear in support of their several theories of complaint. That allusion is immaterial in light of the fact that the court does accept as fact every ultimate fact which they assert that they would prove, including the belated, shifting-sands fact that the construction of the plaintiffs' proposed center, had it been realized, would have required the interstate shipment of building materials having value measured in millions of dollars. Thus, the bare-bones complaint is deemed to be fleshed out by all factual premises which plaintiffs now assert they can prove. The motions are considered in that context.

The Sherman Act does not reach every conspiratorial action which does have the effect of restraining trade and commerce. What it does condemn are those acts which occur within the flow of interstate commerce, or which, though they occur locally and intrastate, do substantially affect interstate commerce. *E.g., Burke v. Ford*, 389 U.S. 320, 321 (1967); *Las Vegas Merchant Plumbers Association v. United States*, 210 F.2d 732, 739 (9th Cir. 1954), *cert. denied*, 348 U.S. 817; *DeVoto v. Pacific Fidelity Life Insurance Company*, 516 F.2d 1, 4 (9th Cir. 1975). In the context of acts "affecting commerce," as opposed to those

"in commerce," the critical test is whether the relationship of such acts to interstate commerce is too tenuous to warrant federal control. *Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n., supra* at 759.

Plaintiffs' "In Commerce" Theory

Plaintiffs contend that their activities were "in interstate commerce" because they were engaged in the activity of soliciting potential tenants, some of whom are headquartered outside the state of Illinois. In that regard, they refer to the fact that both Sears and May are New York corporations and that both engage in substantial interstate business.

That premise must fail. Plaintiffs' activities were geared to the development of real estate in Illinois for the purpose of providing a regional center, through the facilities of which persons other than themselves would engage in the intrastate retail sale of merchandise. That wholly local activity does not become an activity "in interstate commerce" simply by reason of the fact that they did solicit prospective tenants from other states.[8]

Several courts which have considered the question whether intrastate real estate transactions are within the purview of Sherman Act protection have held that that Act does not apply. *Marston v. Ann Arbor Property Managers Association*, 422 F.2d 836 (6th Cir. 1970), *cert denied*, 399 U.S. 929, grew out of an alleged conspiracy to monopolize residential property rentals in the vicinity of Ann Arbor, Michigan. *Cotillion Club, Inc. v. Detroit Real Estate Board*, 303 F. Supp. 850 (E.D. Mich. 1964),

[8] Interestingly enough, in this context plaintiffs summarize their statement of essential facts as the facts that Sears and May are "interstate" businesses, and that they, the plaintiffs, "were actively engaged in soliciting potential tenants up to April, 1973." Neither the complaint nor the essential facts stated attribute any interstate character to those pre-April activities.

alleged a conspiracy to monopolize real estate sales in Detroit, Michigan, and vicinity. *Saint Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc.*, 316 F. Supp. 1045 (D. Minn. 1970), involved a claim that restrictive lease covenants which barred the opening of a competing retail establishment in a desired location violated the Sherman Act. *Savon Gas Stations No. 6, Inc. v. Shell Oil Company*, 203 F. Supp. 529 (D. Md. 1962), likewise arose out of a restrictive covenant in a lease which denied to the plaintiff direct access from its gasoline station to an adjacent shopping center parking lot. In each of those cases the court held that the transaction related to land was essentially local, not interstate, and that it had no substantial effect upon interstate commerce. *Cf. Lieberthal v. North Country Lanes, Inc.*, 332 F.2d 269 (2d Cir. 1964), which arose out of an alleged conspiratorial breach of a contract between a local developer and an interstate chain of bowling alleys. The court did not consider the question of the contract as such.

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) relied upon by plaintiffs, involved a situation which was substantially different from that involved in both the cases cited above and the case at bar. The critical thrust of the complaint was that there existed a conspiracy to fix prices throughout Fairfax County, Virginia. The critical issue was the question whether there existed a factual nexus with the Act.

The complaint alleged that all attorneys within the area were parties to an agreement to fix minimum prices for the examination of titles to real estate. The agreement was exemplified by a schedule of minimum fees which had been adopted by a local bar association, and which, in turn, was supported and enforced by the agency of the Virginia State Bar. Factually, it appeared that a substantial part of the real estate transactions in that county were inter-

state in nature, in the sense that the financing of a substantial volume of the total transactions came from outside the state, from either federal agencies or private lenders.

Considering the argument that such legal services were wholly local, the Court characterized the fee schedule as "a classic illustration of price fixing." *Ibid* at 781-783. The Court said that the argument misconceived the nature of the transactions involved, saying that the transactions which created the need for the legal services were in many cases interstate transactions. It held that the local service was only one integral part of the interstate commerce thus involved. *Id.* at 783-785. In that regard, the Court said, "Given the substantial volume of commerce involved, and the inseparability of this particular legal service from the interstate aspects of" the real estate transactions encompassed therein, an effect on interstate commerce was shown. *Id.* at 785.

Significantly, it appears from the Court's factual recital that many transactions involved persons resident outside the state of Virginia, but that fact appears to have no bearing upon the Court's decision. It held that the transactions were "in" interstate commerce only because of the substantial volume of interstate financing.

Similar considerations were present in *Gateway Associates, Inc. v. Essex-Costello, Inc., supra*, in which the court denied a motion to dismiss an antitrust complaint which was grounded upon an alleged conspiracy to monopolize real estate sales in an area of Northern Illinois, situated in close proximity to the state of Wisconsin.

No considerations of like import affect the case under consideration. In fact, it is extremely questionable whether the complaint, including all its subsequently added flesh, can be construed to allege that any interstate commerce character attached to plaintiffs' attempts to negotiate

leases. The question need not be further pursued. No case is found which has held that negotiations between citizens of different states for a contractual agreement which would be performable intrastate, without more, is a transaction which is either "in" interstate commerce or which substantially affects such commerce. A necessary corollary of the plaintiffs' argument is the conclusion that every contract between citizens of different states is protected by the provisions of the Sherman Act. If such a nebulous scope is to be engrafted upon the antitrust laws by judicial interpretation, that decision must come from a court possessed of a greater power and wisdom than that with which this court is endowed.

The "Effect on Interstate Commerce" Theory

The court must also conclude that the complaint, as embellished by all essential facts which plaintiffs represent that they can prove, shows conclusively that the defendants' acts do not have any substantial effect upon interstate commerce.

Intrastate activities have been condemned as violative of the antitrust laws, when it has appeared that such activities did impose a substantial burden on interstate commerce. *E.g., Burke v. Ford*, 389 U.S. 320 (1967); *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

In *Burke*, the liquor wholesalers in the state of Oklahoma entered into an agreement which adopted a statewide division of the liquor market among themselves, both territorially and as to brand names of liquors made available in the various territories. No liquor was distilled in the state, and all entered the state through interstate commerce. In condemning the practice, the Court said that the activity was not "in" interstate commerce, but that

it was within the purview of the Sherman Act because it did substantially affect such commerce. That substantial effect was found to exist for two reasons. The first was that the territorial division "almost surely" resulted in fewer sales to retailers and fewer purchases from the out-of-state suppliers. The second was that the brand-name division within the state reduced the availability of wholesale markets to the distillers who were engaged in interstate commerce. 389 U.S. at 321, 322.

The *Mandeville* case involved a conspiratorial arrangement among sugar beet processing companies fixing the prices which they would pay to sugar beet growers. Though the immediate impact of that arrangement affected only Northern California farmers, and, thus, was intrastate only, the unique circumstances involved imbued the arrangement with an interstate commerce significance.

Sugar beets can neither be stored nor shipped for substantial distances without processing. Producers had two alternatives. They either grew beets under a contract with one of the three processors who were located in the geographic area, or they did not grow beets. After harvest, the beets were processed, intrastate. Substantially all of the raw sugar thus produced then entered the stream of interstate commerce. The three processors, who, in the aggregate, held a monopolistic position, were all parties to the price fixing agreement.

Against that background, the Court said that the production and processing stages could not be divorced from the interstate commerce stage without considering the economic continuity and effect of the intrastate stages upon the interstate stage. 334 U.S. at 229. Further, the Court said that the conspiracy, though localized in its immediate effect, was condemned by the Sherman Act because the conduct was just one inseparable element of a total pro-

gram which depended for its success upon activities in interstate commerce. That effect being demonstrated, it was held to be immaterial at which precise stage the illegal restraint occurred. *Ibid* at 236-238.

Other cases upon which plaintiffs principally rely grow out of a similar background of fact. In each, though the primary impact of a conspiratorial act was local, there were existent facts which imposed a substantial effect on interstate commerce. *E.g., Lehrman v. Gulf Oil Corporation*, 464 F.2d 26 (5th Cir. 1972), *cert denied*, 409 U.S. 1077; *Battle v. Liberty National Life Insurance Company*, 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110; *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3rd Cir. 1973); *Rasmussen v. American Dairy Association*, 472 F.2d 517 (9th Cir. 1972). Neither those cases nor any other found have recognized the existence of Sherman Act application in the absence of factual demonstration that there was substantial impact upon some protected element of interstate commerce.

The crux of the issue presented is epitomized by the language contained at page 20 of plaintiffs' brief, the thrust of which is summarized as follows. The defendants acted with a purpose to monopolize "the regional shopping center business in the Springfield" market; there will be no competitor to the White Oaks Center and "prospective tenants of a regional shopping center in said area" have had to turn to White Oaks. There is no suggestion that White Oaks is an instrumentality in interstate commerce. In what, then, have plaintiffs been restrained? It seems clear from their statement of position, above summarized, and from the allegations of fact which they have made, that they have been restrained only in their desire to sell or lease, and their prospect for the sale or leasing, of real estate in Springfield, Illinois. If that restraint has any sub-

stantial effect upon interstate commerce, that effect is neither pointed out to the court nor perceived by the court.

Plaintiffs' Building Material Theory

At the outset, the court accepts the fact that had the plaintiffs' plans been realized, such plans would have necessitated the interstate movement of a very substantial volume of building material.

However, that accepted fact is not determinative of the issue. In its well-reasoned opinion in *Lieberthal v. North Country Lanes, Inc., supra*, the Court of Appeals for the Second Circuit determined that the fact that a conspiratorial abridgement of a contract, which would have led to the interstate transportation of building materials and equipment, did not have any substantial effect upon interstate commerce. The court characterized such interstate activity as a "one-shot" affair which could not be held to convert the proposed venture into an interstate activity. 332 F.2d at 272. The rationale of the court was that the interstate movement of such material and equipment was incidental to the operation of an intrastate business.

The *Lieberthal* rationale was followed in *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969). In *Page v. Work*, 290 F.2d 323 (9th Cir. 1961), the court said that there was no Sherman Act impact in any "local restraint applied at a local level to a product which never enters into the flow of interstate commerce."

In this context the plaintiff argues that *Lieberthal* is distinguishable in the fact that it involved only one bowling alley, whereas the instant case involves the far greater quantum of materials which would be used in construction of a regional shopping center. It is certain

that quantum considerations do enter into "affecting interstate commerce" decisions, but an attempt at quantum distinction is too simplistic in the present context. As *Cherney* suggests, a "de minimus" impact upon interstate commerce will not support a civil antitrust complaint, whereas such a complaint is sustainable upon allegations and proof of a "substantial" impact.

As the court views this cause, quantum considerations have no bearing upon it. In the first instance, the court believes that *Lieberthal* is a sound decision and that quantum considerations do not enter the picture when a court is dealing with only the fact of the shipment into the state of materials for wholly intrastate construction of real estate improvements. The second instance is a corollary of the first, namely, that quantum considerations become important only in relationship to commodities produced intrastate, which do, as such, become a part of the stream of interstate commerce. Are the courts, through interpretation of the Sherman Act, to convert the construction of every residence, every business premises, every apartment building, and every shopping center into an interstate venture simply because construction materials do move in interstate commerce? In this court's view, that is a Pandora's Box of federal restraint which Congress never intended to open. Moreover, if that congressional intent be deemed to exist, that fact might raise very serious constitutional issues.

In fact, plaintiffs concede by their complaint that there is no restraint upon interstate commerce. They allege that their development efforts were pursued until 1973 when two events occurred—Sears signed with Barker for a White Oaks location, and the SV defendants abrogated their contract with plaintiffs for the purchase and development of a part of the plaintiffs' land. Their whole theory of complaint is geared to the premise that without Sears

as a committed tenant, development of a regional shopping center in the Springfield market was not feasible. They operated upon the theory that their efforts would succeed or fail, depending upon a decision by Sears. The premises preclude the feasibility of competing regional centers. Thus, from the outset of plaintiffs' competitive efforts against Barker, any contemplated interstate movement of building materials was restricted to that material which the construction of one center would require. The court is at a loss to understand in what manner interstate commerce is restricted at all, especially in view of the plaintiffs' statement that the White Oaks venture is substantially more ambitious in the sense of total leaseable space, or saleable space, and in construction cost, than was the venture which the plaintiffs initially envisioned.

The court is cognizant of the fact that the interstate movement of construction materials may, in a proper case, have a Sherman Act impact. *E.g., United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256 (7th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3229. There the court held that an alleged criminal conspiracy to rig bids upon contracts for construction of public facilities contained the requisite Sherman Act nexus because of the impact of that price-fixing scheme upon the interstate commerce in construction materials necessary for such projects. The bid rigging itself was deemed to have the effect of excluding certain materials and suppliers from competition in the interstate market. There is no such picture here. The uncontested facts of the instant case are too tenuously related to interstate commerce to invoke federal jurisdiction.

Plaintiffs' Retail Sales Theory

Plaintiffs' theory of jurisdiction, attaching by reasons of the anticipated substantial volume of retail sales which

the ultimate development of White Oaks is anticipated to generate, is novel in two respects. First, it relies upon a prospective effect upon interstate commerce which will not occur until some unfixed time in the future.[9] Secondly, in light of the fact that plaintiffs are not, within the context of complaint, engaged in retail merchandising, their assertion of their injury must be vicariously tied to an anticipated prospective effect which will fall upon persons other than themselves. No case is found which has sustained antitrust jurisdiction upon a like premise.[10]

It is difficult to conceive of an effect operating upon that interstate commerce which relates to the retail selling of goods under these circumstances in which the facilities for such retail sales do not, in fact, now exist. There is the estimated, potential, gross retail sales volume which White Oaks is expected to generate, but there is no suggestion that such volume would be lessened or otherwise affected by any state of facts claimed by the plaintiffs to exist. It is also suggested that the factual premises will, when White Oaks becomes an operative market place,

[9] The argument of certain of the defendants that there can be no effect either alleged or shown because White Oaks may never become an operative venture is untenable. The fact is that White Oaks is under construction. The further fact is that Sears, May, and others are ready to assume occupancy whenever the advancement of construction permits. It must be realistically assumed that the business of retail selling on the White Oaks premises will become a matter of operative fact at a time in the future. As May has candidly stated, in effect, it will be engaged in such sales and it expects that activity to begin in 1977.

[10] There was present in every case of which the court is aware an operative and ongoing engagement of the plaintiff in the particular field of commerce, with the exception of cases exemplified by the *Lieberthal* and *Red Owl* cases, in which it was alleged that a conspiratorial activity had prevented the plaintiff from entering an intended engagement in such commerce. No case is either cited to or found by the court in which a complaint has rested upon a theory that the plaintiff was injured by an alleged unlawful activity which would have an impact upon a business in which he was neither engaged nor intending to engage.

deprive the consuming public of shopping at a center upon plaintiffs' land, or of the right to choose between competing centers. Again, the court can only devine, and it is in no sense apparent in what manner and to what degree, if any, interstate commerce might be affected thereby.

Assuming for present purposes that proposed and projected retail activities which have not achieved fruition may ever be considered within the antitrust context, those allegations of sales volume and interstate commerce volume cannot aid this complaint. Neither the wholesale sale, *Burke v. Ford*, *supra* at 321, nor the retail sale of merchandise, intrastate, after such merchandise has left the stream of interstate commerce, *Evans v. S. S. Kresge Company*, *supra*, 394 F. Supp. at 836; *Saint Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc.*, *supra*, 316 F. Supp. at 1048; *Savon Gas Stations No. 6, Inc. v. Shell Oil Company*, *supra*, 203 F. Supp. at 534, is, per se, within the purview of the Sherman Act. Restraints imposed at those levels can give rise to a cause of action only if such restraints are coupled with other factual considerations which reveal that they do substantially affect interstate commerce.

Again, assuming the same premises and scope of the Act, and accepting the estimates of more than $50,000,000 anticipated retail sales volume, and of more than 50% of such merchandise reaching the ultimate retailers through interstate commerce, and assuming that the consuming public would be expected to be in some manner touched by those operative facts, plaintiffs' assertion of a jurisdictional base becomes wholly nebulous. In this regard, they espouse a position which is deemed to be a patent misconstruction of Section 4 of the Clayton Act. 15 U.S.C. 15.

A brief summary of the opposing views of the parties places the matter in perspective. Defendants argue that

the plaintiffs, within the context of this complaint, are engaged in the wholly intrastate business of the development and enjoyment of real estate, not in the business of retail selling, and that they cannot create a jurisdictional basis for complaint upon the fact that the eventual operation of White Oaks will involve retail sales by others of merchandise received by such others in interstate commerce. Plaintiffs characterize that argument as "wholly groundless," stating that there is no provision of the antitrust statutes "from which it may be implied" that a party lacks standing under the Clayton Act to sue for injury arising out of an illegal restraint upon "a line of commerce other than that in which he is engaged."

Their argument rests upon the following premises. First, the actions of the defendants imposed a restraint upon plaintiffs' efforts to develop their land. Second, that one necessary effect of that restraint will limit prospective lessors of mall space to dealing with White Oaks only. Third, that mall shopping by the purchasing public in the market area will be limited to shopping at White Oaks. Fourth, that it must be presumed that that limitation imposed upon the purchasing public will have an effect on interstate commerce. Fifth, that it follows from those four premises that plaintiffs have suffered a restraint which dose affect interstate commerce.

It is obvious that the burden, if any, which would arise from the fact that White Oaks will be the only available shopping center, falls upon the consuming public and, possibly, upon retailers who are in the market for mall space in the market area. The restraint of such burden cannot descend as a vicarious mantle around the plaintiffs to convert a presumed injury to other persons into an injury to the plaintiffs in their use and enjoyment of real estate.

The court is aware of no case in which jurisdiction was grounded upon the fact of injury to persons other than the party who made the complaint. The statement quoted in *Mandeville* that the Act "is comprehensive in its terms and coverage," 334 U.S. at 236, cannot be construed to support plaintiffs' position. That observation was made by the Court in obvious reference to the fact that the restraint with which the Court dealt was wholly localized in its immediate effect. However, the parties plaintiff were those persons who were directly injured by that restraint. *Mandeville* can only be construed as saying that a restraint which is localized in its immediacy is nevertheless within the purview of the Sherman Act if it is shown to be one inseparable stage of an essentially interstate venture.

Conceivably, in a proper case, a jurisdictional basis for a suit might reside in a person who is, only incidentally, injured by an act which mainly affects persons other than himself. But in the view of this court, a complaint would have to allege that the complainant was directly injured by the operation of such incidental effect.

The court has, nevertheless, herein considered plaintiffs' position based upon the relationship of interstate commerce to the eventual retail activity at White Oaks. Even so, this complaint, when fleshed out for all asserted theories, with all asserted facts admitted, does not set forth any basis for federal antitrust jurisdiction.

In summary, the asserted facts when uncontested require the conclusions that plaintiffs' activities in the premises were not "in" interstate commerce, and that any effect of the defendants' acts upon interstate commerce is too tenuous and remote to invoke the court's jurisdiction. It has been aptly observed that most localized activity does have some remote effect upon interstate commerce, but that some "de minimis factor must intervene or federal regu-

lation is boundless." *Rasmussen v. American Dairy Association*, 472 F.2d 517, 526 (9th Cir. 1972), *cert. denied*, 412 U.S. 950.

For the reasons stated, Counts II, VIII, IX, and X, inclusive, are dismissed for want of subject matter jurisdiction.

The State Law Counts

A necessary result of the premises is that all counts of the complaint grounded upon state substantive law must also be dismissed, because complete diversity of citizenship does not exist.

Plaintiffs suggest, in this context, that the court's prior order which denied motions to dismiss those counts resolved the jurisdictional issue thereto related. That premise is untenable. The prior order was entered within the context of the assumption that federal jurisdiction did exist under the antitrust laws. The state counts arose out of the same operative facts which led to the federal complaint. In the light of the facts, as then assumed to be true, the court held that the state counts had a proper jurisdictional basis under the doctrine of pendent jurisdiction. It is now evident and determined that the federal jurisdiction at that time assumed does not exist. Pendent jurisdiction cannot exist in a vacuum. Given the conceded want of complete diversity of citizenship and the absence of federal jurisdiction under the antitrust laws, the court can have no jurisdiction over the counts grounded in state law.

Accordingly, IT IS ORDERED that the complaint herein is DISMISSED for want of jurisdiction, without prejudice to any cause of action in an appropriate forum.

ROBERT D. MORGAN
United States District Judge

APPENDIX C

EXCERPTS FROM PLAINTIFFS' CONCISE SUMMARY OF ESSENTIAL FACTS

8. The term "regional shopping center" as used in the shopping center trade generally refers to a shopping center in which two or more major department stores are located, serving a trade area of at least 100,000 persons, usually having an enclosed mall for other retail stores, and 400,000 sq. ft. or more of gross leasable area.

9. At all times here involved and up to the present time there were and are no regional shopping centers located in Sangamon County, Illinois, or the "Springfield market area." The White Oaks Shopping Center will be a regional shopping center. Plaintiffs were endeavoring to develop a regional shopping center on the Sapp site up to April 20, 1973.

10. The "Springfield market area" means an area consisting of the City of Springfield, Illinois, together with the area which surrounds Springfield from 40 to 50 miles in all directions. Said term refers to the area from which customers are reasonably likely to come for the purpose of shopping at a regional shopping center in and near the City of Springfield, Illinois, and is the area which is reasonably likely to be served by the White Oaks regional shopping center when it opens.

11. The "Springfield market area" would not support any other regional shopping center with the White Oaks Shopping Center being developed as indicated in P. Ex. 164 or with the development as reflected by P. Ex. 164 plus John Bressmer's Department Store, with an area of approximately 60,000 sq. ft.

* * * * *

56. The White Oaks Shopping Center is under construction and will be substantially in the form indicated

by Pltf. Exh. 164 and the stores to be located by Famous-Barr, Montgomery Ward, Myers Brothers, and Sears will be in substantially the position indicated in said exhibit and will be substantially of the size indicated in said exhibit. In addition, a fifth department store, John Bressmers, will be located in the shopping center with gross leaseable area of approximately 60,000 square feet. Plaintiffs are advised that all documentation with respect to Famous-Barr, Sears and Montgomery Ward was completed some time ago; and, that while, as to Myers and Bressmers, some documents have not been fully executed, firm understandings have been reached and the actual execution of documents is agreed upon, understood and mechanical and that said Myers' and Bressmer's department stores will be in White Oaks.

* * * * *

58. It is reasonably anticipated that gross retail sales at White Oaks Shopping Center shall be well in excess of $50,000,000 following the opening of the center.

After said stores have opened, the annual sales of Sears, May, Montgomery Ward and Myers Brothers are reasonably anticipated to exceed $12,000,000 annually each and the annual sales of John Bressmer's store are reasonably anticipated to exceed $6,000,000. In excess of 50% of the goods and products sold in the White Oaks Shopping Center generally and in each above-mentioned store specifically will have been shipped in interstate commerce as they move from the manufacturer, producer or supplier to such stores. Such shipments will be made by railroads, truck, airplane or by other vehicle.

Until the incidents otherwise described in evidence of April, 1973, plans for the development of the White Oaks Shopping Center were for two or possibly three department stores with approximately 125,000 square feet of mall space located in a single-story mall. During

and after April, 1973, the size as to gross leaseable area and other aspects of White Oaks Shopping Center were expanded so as to include department stores for Famous-Barr, Sears, Montgomery Ward, Myers Brothers, and finally John Bressmer's. A two-story mall is planned and is in the process of being constructed. P. Ex. 164 reasonably reflects the development and construction of White Oaks except that John Bressmer's Department Store of some 60,000 square feet has been added.

* * * * *

Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1517

RICHARD E. JACOBS, et al.,
Petitioners,

vs.

LEONARD W. SAPP, RALPH HURWITZ, and
CHARLES ROBBINS,
Respondents.

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

In Opposition to the Petition for Writ of Certiorari

QUESTION PRESENTED

Respondents respectfully submit that a Writ of Certiorari to review the holding of the Court of Appeals in this case should be denied. Petitioners' Brief distorts the holding of the Court of Appeals, in an effort to create the appearance of a conflict with decisions in other circuits. In fact, the Court of Appeals, in its ruling herein, did no more than reaffirm the doctrine of *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Association*, 484 F.2d 751 (7th Cir. 1973), *cert. den.*, 414 U.S. 1131 (1974) (hereinafter, "*Cherney*"). In *Cherney*, the Court of Appeals held that factual jurisdictional issues in

complex antitrust cases such as the case at bar should be determined only "after a thorough exploration of all evidence that either side can produce . . ." 484 F.2d 751, 759. That holding was based upon rulings by this Court and upon decisions in other circuits. The holding and principle are sound, and are consistent with the policies of the anti-trust laws of the United States, as well as those of the Federal Rules of Civil Procedure. The holding in *Cherney* was brought before this Court for review on a petition for certiorari, and same was denied. The issue is now well settled, in accordance with sound principles of law. Review of same by writ of certiorari in the instant case would be unwarranted and inappropriate, and should be denied.

As will be discussed below, the decision of the Court of Appeals in no way presents a question ". . . of whether a Court of Appeals can exclude a certain class of civil cases from the operation of Rules 12 and 56, Federal Rules of Civil Procedure, whether a Court of Appeals can ignore and obviate pre-trial procedures established by a district court pursuant to Rule 16, Federal Rules of Civil Procedure, and whether the application of the principle enunciated by the Court of Appeals constitutes an impermissible invasion into the province of district court decision making," as stated by petitioners (Brief, p. 3). Further, the decision is not in conflict with decisions from other circuits, but is completely harmonious with the principles recognized in cases presenting similar questions. Accordingly, the writ should not issue on these purported grounds.

Another basis for denial of review in this cause is that any questions raised by the ruling of the Court of Appeals overruling the Trial Court dismissal of respondents' First Amended Complaint are rendered totally moot by the Court of Appeals

holding permitting the filing of respondents' Second Amended Complaint (which petitioners have not challenged). The posture of the cause below is that the case will proceed to trial on the Second Amended Complaint. Therefore, certiorari to review dismissal of this pleading would be totally superfluous, and should be denied.

STATUTES AND RULES INVOLVED

In addition to the statutory provisions and rules of the Federal Rules of Civil Procedure cited by petitioners, respondents respectfully direct the attention of the Court to the following provisions of the Federal Rules of Civil Procedure:

Rule 8, Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> (a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third party claim, shall contain (1) a short and plain statement of the grounds upon which the Court's jurisdiction depends . . .
>
> (e) *Pleading to Be Concise and Direct; Consistency.* (1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleadings or motions are required.

STATEMENT OF THE CASE

Respondents adopt petitioners' Statement of the Case, with the following additions necessary for completeness and accuracy. (Also, because petitioners have submitted selected excerpts from the "Concise Summary of the Essential Facts Which Plaintiffs Expect to Prove" (hereinafter referred to as "Concise Summary") we have included relevant statements from that document in the Appendix to this Brief.)

A. The Plaintiffs' Claims

The jurisdictional allegations of plaintiffs' First Amended Complaint are set forth verbatim in the decision of the Court of Appeals below, reprinted at page A-6 of Appendix A to Petitioners' Brief. In substance, these were that the development of respondents' shopping center (hereinafter, the "SHR" site or project) or the development of petitioners' "White Oaks" project, and the subsequent operation of either or both of these regional shopping centers, would substantially effect interstate commerce in that millions of dollars in goods or merchandise would flow into and out of said shopping center or centers annually in interstate commerce, and that the actions of defendants and the conspiracy between them were undertaken to restrain trade in interstate commerce, destroying potential competition and substantially effecting interstate commerce.

Further, in their "Concise Summary," prepared in obedience to the standing Pre-Trial Order of the Trial Court, respondents as plaintiffs set forth the following propositions: That respondents Sears and May, the major department store tenants of the White Oaks Center, are New York corporations doing substantial interstate business; that respondents had been engaged in the effort to develop the SHR property at the site of a re-

gional shopping center from early 1971 to April 1973, and had been actively engaged in soliciting potential tenants for same up to April 1973; that development of a regional shopping center which could successfully compete with the White Oaks Center as developed after the improper actions of respondents has become an impossibility; that two competing regional shopping centers could have been developed in the Springfield area prior to and but for the actions of petitioners, which had as their purpose of elimination of actual and potential competition for the White Oaks Center; that the White Oaks Center, as developed, will generate annual retail business in excess of Fifty Million Dollars ($50,000,000), of which more than half will originate out of state (Appendix A to Respondents' Brief).

B. **Proceedings Below**

Following the filing of the First Amended Complaint by respondents, all petitioners filed elaborate motions, supported by substantial memoranda of law, to dismiss or stay the action on the basis of numerous procedural and substantive issues. None of the issues raised included any supposed defects in the jurisdictional allegations of the First Amended Complaint. All of said motions were heard by the Trial Court, and were overruled in a fifteen-page decision filed on January 17, 1975.

Following the decision of the Trial Court on these motions, extensive discovery was undertaken by all parties, including respondents. On July 25, 1975, the Trial Court ordered the cause set for jury trial on January 12, 1976.

At no time during any of the discovery and other pre-trial proceedings, including the pre-trial conference of December 12, 1975, was the sufficiency of the jurisdictional averments of the First Amended Complaint challenged or even referred to by

counsel for any of petitioners. No discovery was undertaken by any party with respect to the jurisdictional averments of the First Amended Complaint, and no fact record was ever made with respect to them. The issue of subject matter jurisdiction was first raised by the filing by petitioner May Department Stores of a motion for summary judgment, on December 23, 1975. All other respondents thereafter filed motions to dismiss the First Amended Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure.

The Trial Court on January 7, 1976 entered an order continuing generally the January, 1976 trial setting. The parties were ordered to brief the issues raised by the various motions, and oral hearing was set for January 30, 1976. Argument on the motions was heard in chambers, and respondents were not afforded the opportunity to present evidence on the issue of jurisdiction. At the January 30, 1976 hearing, respondents moved the Court to grant leave to amend their First Amended Complaint if the motions to dismiss were sustained.

By order entered February 20, 1976, the Trial Court sustained the motions to dismiss, without granting leave to respondents to amend their Complaint. On March 17, 1976, respondents filed a motion for leave to file their Second Amended Complaint. The motion was denied by the Trial Court on April 9, 1976, after the Notice of Appeal from the dismissal had already been filed. The denial of leave to amend was briefed and argued by respondents in the Court of Appeals. The Court of Appeals held that this was an abuse of discretion, and that permission to amend should have been granted. (Appendix A to Petition, at A-7)

ARGUMENT

A. Certiorari Should Be Denied Because the Decision of the Court of Appeals Was Sound and Consistent With the Purposes of the Anti-Trust Statutes, the Federal Rules of Civil Procedure, and All Relevant Case Law.

1. **The principle adopted by the Court of Appeals is sound.**

The Court of Appeals held that the Trial Court erred in ruling against respondents on the question of whether the actions of petitioners, as alleged by plaintiffs-respondents, involved trade "in [interstate] commerce" or intrastate commerce which has a "substantial effect" upon interstate commerce, thereby giving rise to subject matter jurisdiction, without a proper evidentiary hearing. In so ruling, the Court of Appeals relied upon its earlier holding in *A. Cherney Disposal Company v. Chicago and Suburban Refuse Disposal Association*, 484 F.2d 751. In its opinion herein, the Court of Appeals, quoting from the *Cherney* decision, stated,

> "In essence, the test is whether '[t]he facts of the particular situation . . . determined [that the] relationship to interstate commerce is too tenuous in a practical sense to warrant federal control.' We hold that such a conclusion can better be determined after a thorough exploration of all evidence that either side can produce, rather than by a motion to dismiss . . ." (Petitioners' Brief, Appendix A, at A-2)

The Court went on to hold,

> "The trial judge in the case here, while recognizing the principle we have elucidated, unfortunately took the position that the 'bare bones complaint . . . fleshed out by all the factual allegations which the defendants [*sic*] now assert they can prove . . .' furnished a sufficient basis for a definitive determination of the jurisdictional issue. We are of the opinion that this was an incorrect approach. The plaintiffs [Respondents herein] should have been permitted to produce all the evidence available to them before determining the effect on commerce issue." (Petitioners' Brief, Appendix A, at p. A-4)

The holding of the Court of Appeals for the Seventh Circuit in *Cherney*, reaffirmed in the decision below, that the issue of interstate commerce involvement or effect for jurisdictional purposes can properly be determined only on the basis of "a thorough exploration of *all* evidence that either side can produce," *Cherney*, 484 F.2d 751, 759, is completely appropriate because the factual questions presented by such an inquiry are necessarily so intimately related to the total factual setting of the case that it is impossible to segregate them for summary determination. Accordingly, these issues can only be determined properly upon a thorough evidentiary record. The same consideration has been recognized by this Court, in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), where it was stated,

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." 368 U.S. 464, 473.

It has long been recognized that there are types of cases "where the question of jurisdiction is dependent on decision on the merits," *Land v. Dollar*, 330 U.S. 731, 735 (1947). This is true frequently, if not always, in anti-trust cases involving a Sherman Act jurisdictional issue which requires determination of whether particular restraints "substantially affect" interstate commerce. Certainly, in the case at bar, the question of whether the restraints alleged by the plaintiffs "substantially" affected interstate commerce is for all practical purposes inseparable from the question of the existence of a restraint on commerce in the

first instance. The same principle is recognized in *McBeath v. Inter-American Citizens for Decency Committee*, 374 F.2d 359 (5th Cir. 1967), where a district court dismissal on motion asserting lack of subject matter jurisdiction was overruled. There, the Fifth Circuit Court of Appeals held,

> "However, where the factual and jurisdictional issues are completely intermeshed the jurisdictional issues should be referred to the merits." 374 F.2d 359, 363.

It is also well established as a general rule, not merely limited to the anti-trust area, that in cases where the jurisdictional issues are closely related to the merits, these issues should not be disposed of summarily, by motion:

> "When the jurisdictional issue is inextricably intertwined with the merits of the case, the courts have generally held that the former should not be decided summarily, but should await a trial on the merits." 2A *Moore's Federal Practice* (2d Ed. 1975), § 12.09, p. 2298.

In light of this principle, recognized by this Court as well as other Courts of Appeals, petitioners' assertion that it is somehow offensive to the Federal Rules of Civil Procedure to require a proper evidentiary hearing on the Sherman Act jurisdictional issue where this is intimately related to the merits, is obviously unsupportable. On the contrary, the approach urged by petitioners and adopted, erroneously, by the Trial Court, clearly conflicts with the sound rule recognized since *Land v. Dollar, supra*, that jurisdictional questions should not be decided without a proper evidentiary record when these issues are intimately related to the merits of the case.

Further, the approach urged by petitioners would, if adopted, run squarely contrary to the principle of notice pleading under Rule 8, Federal Rules of Civil Procedure. Rule 8(a) requires "a

short and plain statement of the grounds upon which the Court's jurisdiction depends . . . " Rule 8(e) requires each averment of a pleading to be "simple, concise and direct." These goals would be totally frustrated if Sherman Act plaintiffs could be subjected to possible dismissal of their claim on the eve of trial, on the basis that they failed to incorporate in their original pleadings all jurisdictional facts and evidence which they would be in a position to prove at trial. Such an approach would be absurd, and would ultimately require plaintiffs continually to amend their pleadings to incorporate facts and evidence obtained in discovery. The requirement of a proper evidentiary hearing on Sherman Act jurisdictional matters adopted by the Seventh Circuit in *Cherney* and in the case at bar is based upon this Court's holdings in *Land v. Dollar* and *Poller v. Columbia Broadcasting System, Inc., supra*. This same principle is recognized by decisions from other circuits. It is sound, and should not be challenged.

2. The effort by petitioners to suggest that the decision of the court of appeals herein somehow interfered with the pre-trial procedures established by the trial court is totally unwarranted.

The effort by petitioners to obtain dismissal of the action on the basis of documents filed by respondents as required by the standing Pre-Trial Order of the District Court herein constituted a gross and flagrant effort to abuse the pre-trial procedures envisioned by Rule 16, Federal Rules of Civil Procedure. The Trial Court's use of same as a basis for its ruling was clearly erroneous, and further reflects the impropriety of attempting to decide the Sherman Act jurisdictional question without a proper evidentiary record.

As was required by the "Standing Order on Pre-Trial Conferences" in effect in the District Court at the time, respondents

on December 12, 1975 filed, along with numerous other required filings, a twenty-eight page document styled "Plaintiffs' Concise Summary of the Essential Facts Which Plaintiffs Expect to Prove." In the introductory portion of said "Concise Summary," respondents included the following caveat:

> "The following statement has been developed in compliance with this Court's 'Standing Order on Pre-Trial Conference. It is a compilation of essential facts which plaintiffs expect to prove in support of their various counts against defendants. A substantial number of witnesses who will be called by plaintiffs are adverse and the factual situation herein involves many transactions extending over a period of some three years. *Accordingly, no effort is made to recite each item of evidence which may or will be developed.* Rather we limit ourselves to 'essential facts' as provided for in the Order." (Respondents' Brief, Appendix A, at p.A-1, emphasis added)

Notwithstanding this caveat, the Trial Court, in ruling upon the motions to dismiss, extracted certain statements from the "Concise Summary" in a fragmentary fashion, and proceeded to treat these as a statement of "all factual premises which plaintiffs now assert they can prove." (Petitioners' Brief, Appendix A, at p.A-22)

It should be noted that respondents had expressly included the question of interstate commerce effect in their "Recital of Contested Issues of Law and Fact," (another required pre-trial filing under the Trial Court's standing Pre-Trial Order), thus clearly indicating their intent to present evidence on this issue at trial over and above the statements in the Concise Summary. More importantly, it should be borne in mind that no question had been raised by any part of the suit regarding subject matter jurisdiction as of the date of filing these pre-trial documents. No effort had been made to explore the subject in discovery, and no factual record of any source existed at this

time. Insofar as respondents were aware at the date of the pre-trial conference, the question of jurisdiction was not a significant fact issue. Certainly, respondents could not have been precluded from presenting evidence on the issue at trial merely because a minutely detailed statement of evidentiary facts in this regard was not included in the "Concise Summary." Such arbitrary application of pre-trial procedure constitutes an abuse of discretion, as was held in *Peter Eckrich and Sons, Inc. v. Selected Meat Company*, 512 F.2d 1158 (7th Cir. 1975):

> "Rule 16 was never intended to be a trap for unwary counsel and their litigants. The Rule itself indicates that these conferences are held in order to produce agreement among the parties and the trial judge as to the scope of the issues in the particular case and the admission of uncontested items of evidence." 512 F.2d 1158, 1163-64.

The refusal of the Court of Appeals to accept the Trial Court's equation of the "Concise Summary" with a full evidentiary record of all facts available to plaintiffs in regard to the jurisdictional issue in no way derogated the policy of Rule 16 of the Federal Rules of Civil Procedure, with respect to local pre-trial rules. On the contrary, the attempt to use respondent's pre-trial filings against them in a harsh and preclusionary fashion was itself an abuse of the Pre-Trial Order, and contrary to the purpose of Rule 16.

3. **The decision of the Court of Appeals in no way interferes with the trial court's determination of jurisdiction.**

The suggestion made at pages 13 and 14 of petitioners' Brief that the requirement of a proper evidentiary hearing for determination of Sherman Act jurisdictional issues somehow deprives a Trial Court of determination of jurisdictional issues is groundless. Nothing in the *Cherney* decision or the decision in the case

at bar precludes a district court from passing on the jurisdictional issue, so long as this is done upon the basis of an *adequate* evidentiary record, and where the plaintiff is afforded an opportunity to develop and present all available evidence. The Court of Appeals in *Cherney*, and in the instant cause, held that these issues were decided on an inadequate record, without plaintiffs having a full opportunity to develop *all* facts available to them. Contrary to the arguments made by petitioners, the Court of Appeals did not hold that in *all* cases the jurisdictional issue must be tried. It did so hold in this case under its facts and circumstances. That holding is preeminently correct.

In this regard, the instant cause contrasts forcefully with that in cases such as *Diversified Brokerage Services, Inc. v. Greater Des Moines Board of Realtors*, 521 F.2d 1343 (8th Cir. 1975), cited by petitioners at p. 15-16 of their brief. We respectfully direct this Court's attention to the facts set forth in the passage there cited. The defendants in *Diversified Brokerage Services* also filed a motion to dismiss for lack of jurisdiction. The Trial Court *reserved* its ruling on the motion, and set a pre-trial conference at which the plaintiffs were specifically directed to adduce *all* of their evidence with respect to the interstate commerce requirements of the Sherman Act. The Court then proceeded to rule on the basis of that evidence. The Court of Appeals held,

> "Under these circumstances, *where appellants were given ample opportunity to present evidence on the interstate nexus* and afforded a full opportunity for discovery, we do not believe it would be appropriate for us to now remand this case to the district court for further proceedings." 521 F.2d 1343, 1347 (emphasis added).

Contrast the situation in *Diversified Brokerage Services* with that in the case at bar, where the jurisdictional issue was not raised until the eve of trial, after all discovery had been completed, and the parties had participated in the final pre-trial conference and completed all required pre-trial filings. The

Trial Court then proceeded to rule the motions solely upon the strength of the pleadings, and a few statements in the pre-trial filings. Unlike *Diversified Brokerage Services*, where the plaintiffs were "given ample opportunity to present evidence on the interstate nexus," in the proceedings herein respondents were totally denied such opportunity.

4. **The holding of the court of appeals herein is consistent with decisions from other circuits.**

Petitioners' effort to create the appearance of a conflict between the holding of the Seventh Circuit in *Cherney*, and in the instant cause, derives from the same misconstruction of these holdings discussed above. The cases cited by petitioners at pages 14 through 16 of their brief, supposedly in conflict with the position of the Court of Appeals herein, prove, on inspection, to be completely consistent with it. The cases of *Rosemound Sand & Gravel Company v. Lambert Sand & Gravel Company*, 469 F.2d 416 (5th Cir. 1972), *Diversified Brokerages Services, Inc. v. Greater Des Moines Board of Realtors* (discussed above), and other cases cited by petitioners at page 16 of their brief, all recognize the principle that the plaintiffs in a Sherman Act case must be given the opportunity to develop an adequate factual record on jurisdictional issues where these are closely related to the merits. In fact, the *Rosemound Sand & Gravel Company* case was cited by the Seventh Circuit *in support* of its holdings herein and in *Cherney*. It upheld a Trial Court decision on subject matter jurisdiction, on the basis that the plaintiff there was *not* "foreclosed from submitting all of the jurisdictional facts to the court." 469 F.2d 416, 418. Such a situation presents a total contrast to that which obtained in proceedings below.

Contrary to petitioners' argument, the position taken by the Seventh Circuit in the *Cherney* decision, and in its decision herein, is completely consistent with the decision of this Court, and with the decisions of Courts of Appeals from other circuits.

B. **Certiorari Should Be Denied Because the Issued Raised by Petitioners Is Now Moot.**

Respondents' appeal from the decision of the Trial Court sustaining the motions to dismiss the First Amended Complaint herein, and the subsequent decision of the Court of Appeals overruling the Trial Court, arose from the Trial Court's refusal to grant leave to respondents to file an Amended Complaint curing the supposed defects found by the Trial Court. Respondents' Second Amended Complaint was submitted to the Trial Court with a motion for leave to file same after the dismissal of the First Amended Complaint, but the Trial Court refused to permit the filing of the amended pleading. Respondents in their brief and argument to the Court of Appeals challenged this refusal as an abuse of discretion by the Trial Court, and the Court of Appeals so held (Petitioners' Brief, Appendix A. at p. A-7). *Petitioners have not challenged this ruling by the Court of Appeals, either in their Petition for Rehearing En Banc or in their present Petition for Writ of Certiorari.*

Even if this Court could find some merit in the issues raised by petitioners regarding the holdings in *Cherney* and in the suit at bar, in the present posture of the case at bar they were completely moot. By virtue of the ruling of the Court of Appeals on the denial of respondent's motion for leave to amend, it is not necessary for this Court to review the decision of the Seventh Circuit overruling the Trial Court's dismissal of the First Amended Complaint because that pleading now is effectively abandoned. The cause can now proceed upon the *Second* Amended Complaint, which was prepared by respondents in response to the supposed defects found in their earlier pleading by the Trial Court. It scarcely bears repeating that this Honorable Court does not sit to decide propositions of law which are not, in fact, presented to it by an actual controversy between the parties to litigation.

> "The duty of this Court . . . is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decision. But the Court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing, in issue in the case before it." *State of California v. San Pablo & Tulare Railroad Company*, 149 U.S. 308, 314 (1893).

Accordingly, the writ of certiorari should be denied on this ground also.

CONCLUSION

For all of the foregoing reasons, and upon the authorities cited, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Excerpts From Plaintiffs' Concise Summary Of Essential Facts Which Plaintiffs Expect to Prove

The following statement has been developed in compliance with this Court's "Standing Order on Pre-Trial Conferences." It is a compilation of essential facts which plaintiffs expect to prove in support of their various counts against defendants. A substantial number of witnesses who will be called by plaintiffs are adverse and the factual situation herein involves many transactions extending over a period of some three years. Accordingly, no effort is made to recite each item of evidence which may or will be developed. Rather we limit ourselves to "essential facts" as provided for in the Order.

Some facts referred to herein have been the subject of stipulation.

1. Plaintiffs are citizens of the State of Illinois. Defendants Richard E. Jacobs, David H. Jacobs, Dominic Visconsi, R. F. Coffin, and Edward H. Crane are citizens of the State of Ohio, and the Springfield Joint Venture is a partnership organized in and under the laws of the State of Ohio. Defendant Edward H. Crane is an attorney and is counsel for the Springfield Joint Venture as well as for Jacobs, Visconsi & Jacobs, Inc., in which all of said defendants are principals.

2. Defendant Sears, Roebuck & Company is a corporation organized under the laws of the State of New York, having its principal place of business in the State of Illinois. Defendant Paul Barker is a resident of the State of Illinois. Defendant May Department Stores Company is a corporation organized and existing under the laws of the State of New York, having its principal office and place of business in the State of Missouri,

but doing business in the State of Illinois. Each (Sears and May) respectively owns and operates a national chain of retail department stores.

3. May operates approximately 103 department stores throughout the United States under various names including the name "Famous-Barr," under which name nine department stores are operated in the St. Louis, Missouri area and under which name May will operate a department store in the White Oaks Shopping Center, Springfield, Illinois, when the shopping center opens. May further operates fifteen discount stores under the name "Venture," a warehouse store at St. Louis, Missouri and some catalog showrooms.

4. Sears owns and operates in excess of four hundred department stores throughout the United States and a number of catalog stores. Sears has for a number of years owned and operated a free-standing store on South Grand Avenue in Springfield, Illinois. Sales in recent years have been in excess of $14,000,000 annually and the store is regarded by Sears as a satisfactory and successful one.

5. Plaintiffs Leonard W. Sapp, Ralph Hurwitz and Charles Robbins are and were at all times herein mentioned the owners in equal shares of all of the beneficial interest in a certain tract of land held in Trust No. PL 3478 with the Illinois National Bank of Springfield, Illinois. Said tract of land, which is part of the corpus of said trust, is 154 acres in size and is located at the northeast corner of Chatham Road (Highway 4) and the South By Pass around the City of Springfield, Sangamon County, Illinois. From 1971 until April 20, 1973 (and to a limited extent thereafter) plaintiffs were actively engaged in endeavors to develop from 100 acres to 120 acres of said tract of land for commercial purposes as a regional shopping center and for related uses. They employed planners and architects, advertised, solicited prospective retail occupants and took many

other steps towards establishing such a regional shopping center.

* * * * * * *

14. All defendants acting in concert and individually performed various acts to cause Sears, May, Myers Bros. and Wards to locate stores in the White Oaks Shopping Center, to the end that:

(a) No other regional shopping center would or could be developed in the Springfield market area;

(b) The Sapp site could not be developed as a regional shopping center;

(c) There would and could be no competition for the White Oaks Shopping Center as a regional shopping center, and no other regional shopping center could be developed in the Springfield market area.

(d) Two regional shopping centers (each with two major department stores, or at least a total of no more than five) would not be developed. Although this would have been possible economically, competition would have been greater, the "market" would have been fragmented and the consumer public would have had a choice of regional shopping centers instead of being required to come to one.

Sears and Jacobs knew that Sears could locate in White Oaks at any time and that White Oaks had not finalized plans because of the fear that Sears would locate in a different regional shopping center. They further knew that Hahn-Newman was capable of developing a regional shopping center. They eliminated Hahn-Newman by convincing plaintiffs that Sears would only locate in a shopping center developed by Jacobs and Sears and Jacobs then had the option of locating in either White Oaks or the Sapp site.

APPENDIX B

Excerpts From Plaintiffs' Recital of Contested Issues of Law and Fact

6. Did the actions of defendants prevent plaintiffs from developing and establishing a regional shopping center on the Sapp site and thus restrain trade in interstate commerce, destroy potential competition and substantially affect interstate commerce?